Supreme Court, U.S.
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No. 94-183

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

IN THE MATTER OF:
UNITED MARKETS INTERNATIONAL, INC.,
Debtor.

R. DAVID LEGG,
Petitioner,

versus

W. STEVE SMITH, Trustee,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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October 8, 1994

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The thrust of Respondent Smith's Opposition is that Petitioner Legg's "facts" are in error, and then Smith proceeds with a diatribe of data irrelevant to and/or subsequent to the entry of the Order under appeal. Legg will address those matters in the order set forth in the Opposition:

At no time were the two appeals from No. 85-0375, the seizure of Legg's homestead and a money judgment, termed without merit or frivolous by any court. Smith's complaint is that Legg failed to "roll over and play dead," instead choosing to exhaust his legal remedies. Smith also misleads this Court by stating that Legg has appealed an accounting ordered in No. 85-0375 and that was upheld; No such appeal exists. An order to account is not even final and appealable until enforcement to compel the accounting is sought. To date, no such enforcement has been sought by Smith, nor any judge below,

since its entry in 1988.[1]

Legg's standing, as a party interest, to object to claims against UMI is clear, and the forum for such adjudication is the cause below. *See* Legg's Petition, p.6-7, n.1. The validity of an Order for Relief does not sanctify any individual claim filed in any given bankruptcy case. Likewise, it is not within Smith's, nor the District Court's, power below to decide what evidence is, or is not, credible in the trial of No. 87-0866, now at bar in No. H-92-2141.[2] It is the jury that decides factual issues, and that jury trial was mandated by withdrawal of reference and this Court's case law.

Legg's Motion to Amend his Answer, etc., below, to conform with judgements subsequently entered and to narrowly plead only personal causes of action in No. H-92-2141, was ruled "moot" due to the striking of his pleadings. No ruling was made on the validity of his claims under that amended pleading. *See* Petition, Appendix C-2.[3]

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[1] Legg has repeatedly stated under oath that it is impossible for him to account without the books and records of UMI and without access to UMI's and his own personal bank records which are in the possession of Smith and to which Legg has been denied access by the District Court below. *See also* Petition for Certiorari, p. 18 n. 8 for the District Court's acknowledgement, "I don't know how you can make someone do something he says he can't." This inability to account is a non-issue with regard to the questions presented to the Court in the Petition.

[2] Legg can think of no reason Smith conceals from this Court the existence of U.S. Army Corps of Engineers documents proving the invalidity of Defendant OBALCO's claim against the UMI estate which would be offered at trial of this matter, other than: (1) Smith refused to subpoena those documents, for years obstructing Legg's efforts to obtain them, (2) Smith has refused to review those documents since they were obtained, and (3) those documents shed light on his own mis-administration of UMI and his liability therefor. Additionally, witness testimony will support Legg's case against Defendants Obaid, OBALCO and OTS. *See* note 6, below.

[3] Contrary to Smith's assertion, no statutes of limitation expire for any malfeasance in his capacity as trustee (or his personal liability therefor) until two years after the close of the UMI case, which has not yet occurred. Also, Smith's law firm was not name as a party in the amended pleading.

See also Petition at pp.6-7 (including n.1 & 2), p.15 (including n.5) and Appendix F-6, n.2.

The Fifth Circuit below expressly did not rule on any contempt issues as none arose prior to the Order under appeal, are not relevant hereto and will be the subject of another proceeding, if necessary. *See* Section 4 below, "Rule 41(b) and Inherent Power." However, Smith attempts to raise this and a mandamus proceeding[4] to prejudice the Court. Counsel is unaware of any alleged bench warrant being sought to be enforced, however, this matter will be addressed in a separate proceeding when, and if, such becomes necessary, and same is irrelevant to the issues presented to this Court.

1. Death Penalty Sanctions Against Bankruptcy Litigant

Appendix A is a letter dated June 2, 1994, to the Clerk of the Fifth Circuit from U.S. Bankruptcy Judge, R.F. Wheless, Jr.[5] In the letter, the bankruptcy judge states clearly his intention to use this case as precedence giving the bankruptcy court power to strike pleadings of litigants for failure to pay monetary sanctions and states that heretofore no case law has given him such clear authority (para.2).

In the case at bar, sanctions entered by an inferior bankruptcy court

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[4] After the entry of the Order under appeal, on August 17, 1994, Legg learned that the District Judge presiding below, who has ruled in other UMI cases, is the cousin of one of Legg's adversaries in the UMI litigation. Since Legg was enjoined from filings and could not request the judge recuse himself, his only recourse was to seek the judge's recusal by mandamus to the Fifth Circuit under 28 USC 455 and 28 USC 144. Although the mandamus was denied without opinion, no ruling termed that suit without merit or frivolous. *Immediately* after Legg filed the mandamus, Smith moved to hold Legg in contempt. In violation of the mandatory provisions of 28 USC 144 requiring him to stand down, the District Judge below set a contempt hearing in Legg's absence (prior to the ruling on the mandamus) and, thereafter, held him in contempt in absentia.

[5] Sitting both in the case below prior to the withdrawal of reference and in the UMI bankruptcy main case, his Honor also entered the Rule 11 sanctions enforced herein.

were enforced by the District Court to deny a party his constitutionally mandated District Court jury trial. With this case as precedence and now being used by bankruptcy judges to strike pleadings, litigants sued in bankruptcy court, who have a right to an Article III court jury trial under *Granfinanciera v. Nordberg*, 492 U.S. 33 (1989), can be sanctioned by an Article I court, have their pleadings stricken for non-payment of monies, and never be granted their right to withdrawal of reference to the District Court for jury trial--all this being accomplished by an Article I court without the constitutional authority to preside over such a case in the first place. Review should be granted in this case to repudiate the imposition of sanctions entered by an Article I court to deny an Article III court jury trial. Likewise, since this case involves various types of monetary sanctions, it is an ideal vehicle for this court to set forth guidelines for the imposition of death penalty sanctions against bankruptcy litigants for the non-payment of monetary sanctions.

2. Non-Payment of Monetary Sanctions

Smith cites no cases from this Court, nor any other authority, setting forth the standards which are to be used in determining financial inability when a bankruptcy litigant's pleadings are to be stricken for failure to pay monetary sanctions, and indeed, by his own admission and that of the bankruptcy judge below, there are none. This Court's guidance is warranted.

3. Rule 12(b)(6)

Nowhere in the record below is there *any* evidence that Legg had anything to do with the theft of UMI records. Smith conveniently omits any record cites to affirm his naked allegation which is now being raised for the first time. Smith alluding to what he "has relied upon from third parties" is designed to misdirect this Court's attention from the fact that he was informed Defendant OBALCO had those records in 1985. His statement should be stricken as scandalous and outside the record. If these anonymous "third parties" in fact exist, they should be have been identified by now (which they

have not) and their credibility assessed by the jury.[6]

4. Rule 41(b) and Inherent Power

The striking of Legg's pleadings and injunction against further filings was entered against Legg *prior* to any factual determination of his ability to pay the sanctions being enforced. The Fifth Circuit's Opinion below clearly states inability to pay is not at issue below, nor is any contempt citation which may have subsequently issued. *See* Petition, Appendix A-9 at n.9, A-13 & A-14. Since Legg was enjoined from filing pleadings with the District Court, he was at a loss as to how to show inability to pay without so filing.[7] Legg did the only thing he thought acceptable; he filed a *fourteen* page sworn affidavit with a financial statement (based upon a U.S. Government form from the Small Business Administration) detailing his deplorable financial condition with assets of $1170, far exceeded by his debt, indicating a negative net worth. His current income as a singing waiter (substantiated by his paycheck) averaged $300 per week. A narrative detailing his unsuccessful professional endeavors since 1985 was included. (District Court R. at pp.587-600). Due to length, only portions of that affidavit are set forth in Appendix B-1.[8]

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[6] The only evidence of record concerning theft of UMI books and records are the sworn affidavits and depositions which support Legg's assertion that OBALCO facilitated the theft of same so that it could take over UMI's contract and earn the profits associated therewith (evidenced in the Corps of Engineers documents); those deponents have been identified (Marty Maloney, Kelly Antwine and Lyn Cypert) and will testify at trial. As to whether or not their sworn statements are credible or do in fact support Legg's position, these are fact issues to be decided by the jury, not at the whim of Smith or the District Judge below.

[7] Legg couldn't even file a Motion for Reconsideration requesting the District Court's be more specific in its Order as to how he was to comply, nor could he file a Motion requesting a hearing within which to submit evidence of financial inability.

[8] The omitted portions of this affidavit deal with: (1) documenting that all but two (of the nine persons and entities) owed sanctions are now dead or defunct with no successors joining in this proceeding, and thus, even if he could pay (which he could not), Legg would require further instruction from the District Court beyond

Evidently, this wasn't good enough; but how else can a party "prove" to a court that he is financially unable to pay, particularly when he has been enjoined from filing further pleadings and denied his own bank records by that court? It is access to those records that the striking of his pleadings (which included a motion to compel access to same, ruled "moot") denied.

The Order of the District Court contained no provision for reinstatement of Legg's pleadings upon payment of monies sanctioned or satisfying the court that he could not pay. It set forth no guidelines by which Legg could judge his compliance, other than the payment of "all sanctions previously imposed against him," and even this is vague as it sets forth no monetary amounts to be paid, nor instructs Legg to whom he must pay such amounts since many of those awarded sanctions are now defunct. *See* Petition, Appendix C-1 & C-2, and note 8 above. Likewise, the Order was devoid of direction as to (1) what would satisfy the court as to financial inability and (2) how to prove it, given Legg was enjoined from filing pleadings. This denial of due process is apparent and should be reviewed (and eventually repudiated) by this Court.

Legg is not popular among bankruptcy trustees or the bankruptcy court system.[9] However, the popularity of a litigant or his case is not an issue to be considered by this Court when deciding if that case is worthy of review. Since 1985, Legg has sought only one thing--a

---

the face of its Order, and (2) A telefax from Defendant Obaid, the owner of Defendants OBALCO and OTS, who is in default below for failure to answer request for admissions and other discovery, admitting that he intentionally ignored Legg's discovery request and would continue to do so.

[9] Legg exposed abuse in the bankruptcy system by initiating a Houston Chronicle investigation (which later won the American Bar Association's Award for Excellence in Journalism) and cooperating with an ABC News "20/20" investigation. At Legg's request, Congressman Jack Brooks (D-Tex), Chairman of the House Judiciary Committee, responded personally and launched a nationwide criminal and civil Congressional investigation into the U.S. Trustee system which was conducted by the General Accounting Office. Under investigation - Trustee W. Steve Smith, Respondent herein, for his notoriety in "never closing cases."

jury trial against Obaid, et al, to prove their claims false. This case involves millions of dollars in missing UMI monies, and documented evidence now shows those monies to be in the pocket of Obaid and OBALCO. Likewise, Smith, as a bankruptcy trustee, is not granted judicial immunity and must be held accountable for his acts of professional malfeasance before a jury. These parties, owed sanctions by Legg today, may well owe him monies at the conclusion of a jury trial.

CONCLUSION

Having shown the requisite special and important reasons for granting his request for writ of certiorari, Petitioner R. David Legg asks that his petition for certiorari be granted.

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APPENDIX A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
515 RUSK STREET, RM. 4025
HOUSTON, TEXAS 77002-2603

R.F. WHELESS, JR. (713) 250-5785
UNITED STATES BANKRUPTCY JUDGE

June 2, 1994

Mr. Charles R. Fulbruge, III
Clerk of the Fifth Circuit
United States Court of Appeals
600 Camp Street
New Orleans, Louisiana 70130

RE: Bankruptcy Case No. 93-2613;
In Re United Markets
International, Inc.,
W. Steve Smith, Trustee vs.
R. David Legg

Dear Mr. Fulbruge:

I have received a copy of Mr. Steve Smith's letter to you of May 23, 1994 involving the above styled case. A copy of that letter is attached for your reference. Naturally I would defer to any final decision of the Circuit concerning publication of the involved opinion, but I think that publication has some advantages.

On several occasions in the past, I have been asked to strike pleadings of several parties who have refused to pay sanctions, but I was never clear that I had the authority to do so. This case establishes that authority. For that reason I believe it to be of precedential value.

Further, I do not expect for R. David Legg to voluntarily obey the order of this Court to give an accounting of the funds taken by him

out of United Markets International nor to pay the sanctions assessed against him nor respond to the money judgment in favor of the Trustee. Publication of Mr. Legg's deeds would constitute a sanction in and of itself, and I personally feel that this is warranted by his behavior. Lastly, I feel that publication of this opinion would be helpful to an understanding by other trial courts (before whom Legg may hereafter appear) of Mr. Legg's mode of operation, as determined in the referred to matters.

Yours truly,

/s/ R.F. Wheless, Jr.
R.F. Wheless, Jr.
United States Bankruptcy Judge
Southern District of Texas

RFW/lgl
Enclosure

cc: The Honorable Norman W. Black
Chief Judge, U.S. District Court
Southern District of Texas
515 Rusk Avenue, Room 11535
Houston, Texas 77002

Mr. W. Steve Smith
Bonham, Carrington & Floyd, P.C.
910 Louisiana, Suite 400
Houston, Texas 77002-4906

Mr. R. David Legg
P.O. Box 22413
Houston, Texas 77227-2413

APPENDIX B

(RELEVANT PORTIONS OF DISTRICT COURT DOCKET #45, Record at pp. 600-599, 597-596, 587)

United States District Court
Southern District of Texas
FILED
AUG-2 1993
Michael Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE: UNITED MARKETS INTERNATIONAL,
INC., Debtor C.A.NO. H-92-2141
Bankruptcy No. 85-00872

AFFIDAVIT OF R. DAVID LEGG

This affidavit is prepared pursuant to court order of the United States District Court. Southern District of Texas, entered July 1, 1993, the Honorable Chief District Judge Norman W. Black presiding. See Docket entry 43. The court required payment of "all sanctions previously assessed against him [Legg] or to satisfy the court that he has no ability to pay." The following is an effort to comply with the court's order, by showing financial inability to pay and is true and correct to the best of Legg's knowledge and belief.

Sanctions assessed against Legg are as follows:

(a) By order of the Bankruptcy Court, dated February 14, 1989, Legg was ordered to pay

(i) $4,534.00 to Trustee W. Steve Smith
(ii) $6,288.75 to Aegis Corporation
(iii) $52,870.31 to Essam Obaid, Taher Obaid, Khalil Awad, OBALCO, Bassim Farouki, Dynasystems Corporation, and C.D.

(Jack) Gilkey.

(b) By order of U.S. District Judge David Hittner, dated December 3, 1991, Legg was ordered to pay to "W. Steve Smith, Trustee for Woodard, Hall and Primm, P.C." the sum of $5,009.00.

Sanctions previously awarded against Legg total not less than $68,702.86.

A personal financial statement of R. David Legg follows, but narrative amplification is in order.

As a result of the involuntary petition filed in February, 1985, Legg lost his company, United markets International, Inc., his sole means of support. In this same proceeding, he was subsequently deprived of his homestead in 1988, and virtually all possessions therein. The bankruptcy proceeding rendered Legg both homeless and destitute, and subsequent efforts to restore financial stability have been unsuccessful.

In recent years, Legg has been involved in a business venture which involved considerable traveling. Air fares and related expenses were borne by the venture partners in this matter, not by Legg - who had no such means at his disposal. Legg was attorney for the venture partners, and his compensation in this venture was contingent on its success. In March of this year, the venture partners determined to abandon the venture, as it had produced no revenues and had been unsuccessful. Legg's services were then terminated. As no revenues were earned, no salaries or fees were paid.

Legg returned to Houston in order to prosecute the present case to trial before jury. Having no funds available, he has taken part time work which pays approximately $300.00 per week, from which he must pay living expenses and child support obligations. He is not at present actively engaged in the practice of law, and has no other source of income.

Legg's financial status is demonstrated in the following personal financial statement....

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(CONTINUING TO PAGE 4 OF AFFIDAVIT)

PERSONAL FINANCIAL STATEMENT OF
R. DAVID LEGG

ASSETS:	PRESENT VALUE:
Cash on Hand	$170.00
Accounts Receivable	0
Savings Accounts	0
Retirement Account	0
Life Insurance,Cash Surrender	0
Real Estate	0
Automobiles	None
Personal Property (clothing, personal effects, etc.)	approximately $1000
Value of Total Assets:	approximately $1170

LIABILITIES:	AMOUNT OWED:
Accounts payable	$3088.90
Notes payable	0
Installment Accounts	approximately $3000
Other Liabilities	$600/mo.
	approximately $6688.90

Accounts payable are owed to Marshall field's/Target ($1,115.92), Neiman Marcus ($1780.40) and VISA ($192.98)

Installment accounts are for rent and telephone through November 1, 1993 totalling approximately $3000.

Other liabilities are payable as child support to ex-wife for two children: said amount due is $300 per child per month at the present

time.

APPROXIMATE NET WORTH (excluding Contingent Liabilities): ($5518.90)

SOURCE OF INCOME:

Salary and Tips--See Exhibit C, Attached hereto, for Earnings

CONTINGENT LIABILITIES:

Legal Judgments (amounts are approximate & exclude post-judgment interest):

1. Judgment Entered in Adversary 85-0375 in 1989 $444,858.41

2. Sanctions Judgment awarded in Adversary 85-0932 $62,693.86

3. Atty's fees awarded in C.A. H-88-1958 $5,009.00

Total of judgments listed above: approx.$512,561.27

APPROXIMATE NET WORTH (Including Contingent Liabilities): ($518,080.17)

FURTHER AFFIANT SAYETH NOT.

/s/ R. David Legg
R. David Legg

SWORN AND SUBSCRIBED BEFORE THE UNDERSIGNED ON AUGUST 2, 1993.

/s/ Christie C. Vela
Notary Public

my commission expires:

/s/ 7-22-95

CHRISTINE C. VELA
NOTARY PUBLIC
*
STATE OF TEXAS
EXPIRES
7-22-95

****

(CONTINUING TO EXHIBIT C OF AFFIDAVIT)

EXHIBIT C

CAFE ANTHONY, INC. 5047

--EMPLOYEE--
01-0000015 LEGG,D

PAY RATE	PERIOD END	CHECK NO.
2.130 HB	07/18/93	005047

EARNINGS	HOURS	AMOUNT	YTD
WAITERS	109.50	233.24	303.00
TIPS REPORTED	.00	268.00	354.00

DEDUCTION	AMOUNT	YTD
Federal W/H	60.62	69.42
FICA	31.08	40.74
MEDICARE	7.27	9.53
TIPS REPORTED	268.00	354.00
GROSS EARNINGS:	501.24	657.00
NET EARNINGS:	134.27	
TOTAL DEDUCT:	366.97	473.69